VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*

S. B. FISHER AND HOMER RICHEY, *Associate Editors.*

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Our First Associate Editor.

Our readers will notice that the name of Mr. Frank Moore no longer appears as one of our associate editors. Mr. Moore has resigned his position with the Michie Company and removed to New York City, where the best wishes of his host of friends follow him. The conduct of this magazine, the editorial column and book reviews excepted, has been practically under the control of Mr. Moore from the time the Michie Company undertook its publication, and to his zeal, ability and earnestness much of the success the periodical may deserve has been due.

To the Editor-in-Chief Mr. Moore's severance from this work is a personal loss and therefore a personal note may not be deemed inappropriate. For Mr. Moore was a member of a family three generations of which had been known to the Editor-in-Chief and to whom he was warmly attached. The old home of his mother's people, noted for its hospitality, its beautiful daughters and manly sons, adjoined the place on which the Editor-in-Chief was reared. Under its rooftree he spent many happy hours in the old days of a long vanished youth. By the open grave of a member of the family, dying ere he had reached his seventeenth year, the first sorrow of childhood's days was experienced, and the memory recalls many events of youth and early manhood connected with Mr. Moore's family. The association, therefore, in the conduct of this magazine was peculiarly pleasant, and in it was continued a friendship which might almost be said to extend over a long period of years. It is almost needless to say that Mr. Moore always showed the most earnest desire to make this periodical worthy of the profession. His best talent was given to its service and the columns in which his work is contained are evidences of his faithful and able work and his high

ability. We believe that in the larger field into which he has gone he will make his mark and we may expect much of him.

Mr. Homer Richey, who succeeds him, has done much work as a law writer and the members of the profession who read the REGISTER we predict will find that the high standard set by the former associate editors will be maintained by him.

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113 Virginia.

In the latest volume of our Virginia Decisions 102 cases are decided and opinions filed. Of these cases 94 are civil and 8 criminal; 52 cases are affirmed and 50 reversed. Of the civil cases 50 are affirmed and 44 reversed; of the criminal cases 2 are affirmed and 6 reversed. There are but two dissenting opinions —one of Judge Whittle in Radford *v.* Clark, page 205, and one of Judge Buchanan in Clements *v.* Adams, etc., Co., page 553. Both of these cases were commented upon at some length heretofore in the REGISTER, and after reading Radford *v.* Clark over again very carefully we are still of the opinion that the dissenting opinion of Judge Whittle in Radford and Clark ought to have been the law, but we do not very well see how the Court could have escaped the decision in Clements *v.* Adams, etc., Co. in the teeth of the statute. We have examined with some interest the cases which went up upon questions of instructions. There were seven such cases, four of which were affirmed and three reversed. To correct the horrible system we have in Virginia as to our methods of instructing a jury upon law, as is probably well known to our readers, has been a sort of a hobby of the REGISTER. Of course we do not see how the present system can be changed except by legislation, and yet in the case of the Wash. Va. Ry. Co. *v.* Bouknight, Judge Cardwell, in delivering the opinion of the Court refusing a reversal asked for amongst other things because certain instructions were refused, says: "The case having been fully and fairly submitted to the jury upon every phase of it presented in the evidence, the court did not err in refusing other instructions asked by the defendant." If our courts would only note this and when instructions have been given that thoroughly cover the whole case decline to multiply

instructions, some of the evil might be remedied, and yet it is right hard to see how the courts can do this, even in the light of Judge Cardwell's opinion, when the law has been so often laid down by the Court of Appeals that the court "is bound to give any instruction asked for by either party, which correctly expounds the law upon any evidence before the jury." Baltimore *v.* Woods, 14 Gratt. 447, and numerous cases down to Lynchburg Telegraph Co. *v.* Booker, 103 Va. 594.

It is to be very much desired that somehow or other we should get the opinion of the court as to what are the proper limits in giving instructions. As early as Brooke *v.* Young, 3 Randolph 106, our Supreme Court settled the law that it is the right of the parties "to demand instructions to the jury within proper limits," but we have been unable yet to find anywhere a clear and cogent definition of what these proper limits are.

Reform in Criminal Law and Procedure.

It is curious that in the widespread demand for reform in pleading and procedure so little attention has been called to the crying need for reform in our criminal law and procedure. England has long since gotten rid of the cumbrous indictment with its multiplication of words, its stilted verbiage and unnecessary reiteration, and our daughter state West Virginia has set us a good example in shortening the forms used in that state for indictments. Under the laws of that state now an indictment for murder, for instance, is almost as simple as it is in England. In England ever since 1851 an indictment for murder which charges that "A on etc., etc., feloniously, willfully, and of his malice aforethought did kill B" is sufficient, without alleging the means by which B was killed, or anything else about the killing. In Massachusetts the statute forms vary very little from those in England, with this curious difference, that in an indictment for murder it is necessary to allege a battery, and the reason given for this is that a conviction of battery cannot be had in an indictment for murder in case the killing turns out not to be proved. Can any one give a good and sufficient reason why the English form is not amply sufficient? Why in a

case of burglary should it be necessary to allege more than the mere fact that "A in the night time broke and entered the house of B (being a dwelling house) with intent to commit a felony or misdemeanor?" Why in a case of perjury should it be necessary to state more than the fact that "A at such a time and before such a court or officer qualified to administer oaths did willfully and falsely swear as follows (setting out the false oath)" and that the oath aforesaid was as to a material matter or thing? It is true our courts have here of late wisely held many indictments to be good which fifty years ago would have been quashed almost without argument, for errors absolutely harmless as far as the right and justice of the case is concerned, and the tendency today is to disregard many of the things which were formerly held to be absolutely essential. Our own court as late as March 20th, 1913, in Shiflett *v.* the Commonwealth has stated that courts of justice are disposed to treat as surplusage all erroneous and improper averments in complaints and indictments where the residue of the allegations sets out the offense charged in technical language and with substantial certainty and precision. Why if the offense is charged with substantial certainty and precision, we may ask, however, should technical words be used? Precision and certainty are the main thing, and if the offense is thus set out, what difference can there be in the use of one word or another? Of course, however, this is a matter in which the courts are helpless. It is for the Legislature to act and strike off the chains of precedent the reason for whose existence has long since passed into the lumber room of the law. There was a time, of course, when all of the forms to which we so slavishly still cling were rendered necessary by the helpless condition in which a prisoner stood at the bar of justice, and which the courts adopted in order to throw around him a protection thus rendered necessary. At one time the prisoner was not allowed counsel; he was not allowed to testify; the slightest offense was punished with death and confiscation of property, and the unfortunate man accused of crime stood mute and helpless with all the powerful forces of the law arrayed against him. Before trial he was immured in what was practically a dungeon; he was tried by a judge living a long distance from the place where court was held, and he had

practically nothing to depend upon but the judge himself, at whose bar he often stood condemned before his case was heard. All of this has passed away except that we cling to the forms, the precedents and technicalities which then existed, and the prisoner is free to take advantage of those technicalities which formerly were essential to aid him in his well-nigh helpless condition. What was then a shield for him has now become a sword in his hand with which he wars upon justice. Is it not about time that we should correct this state of affairs?

In the matter of evidence also the Commonwealth stands at a great disadvantage. The prisoner is no longer denied the right to testify. If he sees fit he can go upon the stand and tell his own story in his own way, and yet if he chooses not to avail himself of this privilege the Commonwealth is not allowed to allude to it, and the fact of his failure to testify in his own behalf cannot be used against him. Why? we may ask. Is it logical? Is it sensible? Is it just? We remember very well when this law was passed that one of the most distinguished criminal lawyers in the State found great fault with it. He said that it had deprived him of one of his strongest pleas; that he could no longer appeal to the jury on behalf of the poor prisoner whose mouth was closed by the law and who stood like a sheep dumb before his shearers. He remarked, however, that it was about evened up by the fact that the Commonwealth could not use the failure of the accused to testify against him. We think it is a little more than "evened up." In every other case and in our everyday life the fact that a man stands mute when he has a chance to exculpate himself is used against him. Why should it not be when he is on trial for a crime?

Reasonable Doubt.

And while we are speaking of criminal law and procedure that last resort of the criminal lawyer suggests itself—our old and well worn friend "reasonable doubt." Never was a term more used, more abused, and less understood. When as great a law writer as Simon Greenleaf has stated that jurists have not been very successful in defining what is a reasonable doubt

(3 Greenleaf on Evidence, 15 Ed. 29) how can one expect the average juryman to grasp what it means? Our own court has time and again defined it: Williams *v.* Commonwealth, 85 Va. 607; McCue *v.* Commonwealth, 103 Va. 870; Tucker's Case, 88 Va. 20; Taylor *v.* Commonwealth, 90 Va. 109; Horton *v.* Commonwealth, 99 Va. 855, and several others; but a perusal of the instructions in these cases shows that whilst the court has defined the terms so as to be perfectly plain to a well trained mind, it is doubtful if the average juryman of the present day can thoroughly take in the meaning of these instructions defining the term. Perhaps the best definition ever given in Virginia is that in Horton's case, supra.

Here our court approved an instruction defining a reasonable doubt as follows: "It must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If after considering all the evidence you can say that you have an abiding conviction of the truth of the charge, you are satisfied beyond reasonable doubt."

Ex-President Taft, wmlst Circuit Judge, in the case of U. S. *v.* Youtsey, 91 Fed. Rep. 864, uses the following very apt and clear language: "A reasonable doubt of guilt is a doubt growing reasonably out of the evidence, or the lack of it. It is not a captious doubt; not a doubt engendered merely by sympathy for the unfortunate position of the defendant, or a dislike to accept the responsibility of convicting a fellow man. If, having weighed the evidence on both sides you reach the conclusion that the defendant is guilty to that degree of certainty that would lead you to act on the faith of it in the most important and critical affairs of your life, you may properly convict him. Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of mistake."

It is to be regretted that our court has followed Chief Justice Shaw in the celebrated case of Commonwealth *v.* Webster, 5 Cush. Mass. 320, in using the words "moral certainty" in defining a reasonable doubt. The Supreme Court of our daughter state

West Virginia declined to adopt this phraseology as a necessary test, in Commonwealth *v.* Costley, — W. Va. ——; and in the case of State *v.* Sheppard, 49 W. Va. 582, says: "The courts generally are disinclined to enter into any explanation of what the terms 'reasonable doubt' and 'moral certainty' mean. And with good reason; for while these terms are well calculated to convey to the jurors a correct idea of what is expected of them, yet many subtleties and refinements might be imposed upon them by any attempt to limit the meaning."

We doubt very much whether this last conclusion of the court is correct. Unless some plain definition of what reasonable doubt means is given to the jury they are very apt to be mislead by the mere use of the term. In the mean time we think there is a fine opportunity for some able grammarian to give us a good definition of the meaning of "reasonable doubt" and make it so plain that the "wayfaring man," as well as the jury man, "though a fool," may understand what it means.

Nine Years' Service.

It is seldom that a Federal District Attorney serves as long as Robert H. Talley, Esq., Assistant United States District Attorney for the eastern District of Virginia. We note that Mr. Talley has resigned and will take up the practice of law in Richmond. He was appointed in 1904 and for four months filled the position of District Attorney, whilst Judge Lewis was campaigning for the Governorship of Virginia. Upon the defeat of Judge Lewis Mr. Talley resigned and was at once re-appointed Assistant District Attorney. During his incumbency in this office Mr. Talley argued a great many important cases before the Government, one being the U. S. *v.* Broad Rock Distilling Company, in which the Government prevailed, the case, however, being appealed to the Circuit Court of Appeals, where it is now pending.

Lawyers in the Limelight.

At no time in the history of this country have lawyers and the law been as much discussed. Many foolish things are said; many wise ones and the ultimate result must be for good. Truth can never fear the "limelight." In an issue of the New York *Times,* for instance, lawyers and laws are discussed by no less person than the Vice-President of the United States, an ex-President and an Associate Justice of the Supreme Court of the United States. In an address delivered April 20th, 1913 at the first annual dinner of the George Washington University Law School, Vice-President Marshall laid down rules for the moral and professional guidance of the young lawyer—legal ten commandments. Here they are in a condensed paraphrase:

1. Don't put a fee before a just cause.

2. Don't worship money to the extent of being willing to write a dishonest contract in order to get a large fee.

3. Be a peacemaker; that is the lawyer's business.

4. Don't chase ambulances.

5. Honor your profession as your own sacred honor; therefore, do not seek or confound litigation.

6. Don't accept contingent fees.

7. Use your influence against the system of allowing attorneys' fees in advance of divorce cases. Therein lies the evil of the divorce laws; when that has been abolished half the divorce cases will be stopped.

8. Use your influence to compel a person charged with crime to testify in the cause; the innocent man cannot be harmed thereby.

9. Take the part of the known criminal, but only to see that justice is tempered with mercy.

10. Don't inquire as to your client's pocketbook before fixing your fee.

And on the same night ex-President Taft said, in an address at a banquet of Yale Law School students and alumni:

"I have had the feeling that some day the Socialists might direct their attacks on the unequal and unjust administration of the law—the failure to administer the criminal law with cer-

tainty, by which criminals so often escape punishment for crimes for which they deserve imprisonment. The existing conditions in this regard are a disgrace to the civilization of this country and should be remedied. There are none better equipped to accomplish these reforms than the members of the bar.

"The courtroom is not the place to gamble with the law. We must keep law and justice together in order to justify law."

And Mr. Justice Holmes, of the United States Supreme Court, said at a private dinner, given a few nights ago in New York, that science had taught the world scepticism and made it legitimate to put everything to the test of proof.

"Of course we are not excepted," he said, referring to the Supreme Court. "Not only are we told that when Marshall pronounced an act of Congress unconstitutional he usurped a power that the Constitution did not give, but we are told that we are the representatives of a class—a tool of the money power. I get letters not always anonymous, intimating that we are corrupt. Well, gentlemen, I admit that it makes my heart ache. It is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives and would be glad of evidence that one was consciously bad. But we must take such things philosophically and try to see what we can learn from hatred and distrust, and whether behind them there may not be some germ of inarticulate truth."

The attacks upon the court, the Justice added, quoting his own words, "are merely an expression of the unrest that seems to wonder vaguely whether law and order pay."

A very important truth to be extracted from the popular discontent, according to Justice Holmes, is that Judges, particularly in State courts, have read their conscious or unconscious sympathies prematurely into the law.

"It cannot be helped—it is as it should be—that the law is behind the times," said Justice Holmes. "As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle front against each other, the

time for law has not come, the notion destined to prevail is not yet entitled to the field."

In connection with this discussion of "premature law," Justice Holmes said that twenty years ago, when a "vague terror went over the earth and the word Socialism began to be heard," fear was translated by Judges into doctrines that had no proper place in the Constitution or the common law.

"Judges are apt to be naive, simple-minded men, and they need something of Mephistopheles," observed the Justice.

Justice Holmes concluded by saying that as he grew old he grew calm, and predicted that competition from new races would cut deeper in the future than workingmen's disputes, and would test whether "we can hang together and fight."

"I do not pin my dreams for the future to my country, or even to my race," he said. "I think it probable that civilization somehow will last as long as I care to look ahead. I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be, that man may have cosmic destinies that he does not understand. And so, beyond the vision of battling races and an impoverished earth, I catch a dreaming glimpse of peace."

We are not disposed to find fault with any of the sentiments uttered, but we might very well ask Mr. Marshall how a poor person injured in an accident—or those dependent upon a man killed by accident through negligence—could ever obtain compensation if it were not for "contingent fees."

The contingent fee in America has never been considered unprofessional and it sounds rather strange in view of Mr. Marshall's utterances on other questions that he should find fault with a system without which justice would often be absolutely unobtainable by those who are poor and have no helper.

Effect of Crediting Check.

In the case of Miller *v.* Norton and Smith, reported in full in this issue of the LAW REGISTER, the Supreme Court, in its opinion delivered by Judge Buchanan, followed previous decisions of the Virginia Supreme Court to the effect that where a customer of a commercial bank deposits with it a check on another bank, indorsed by him without restriction, and the amount thereof is credited to the depositor as so much cash, the bank reserving the right to charge it back if not paid, the question whether the title or beneficial ownership of the check passes to the bank or remains in the depositor depends upon the intention of the parties, and held that, under the circumstances of the case under consideration, the bank was not the beneficial owner of the check. In his opinion, the learned judge states it to be the settled rule in this country "that the mere giving of credit to a depositor's account of a check does not constitute the bank a holder for value, but in order to have that effect, the credit must be drawn upon;" and cites in support of this rule, Tiffany on Banks and Banking, pp. 39, 40, and 7 Cyc. 929.

While there can be no occasion to question the correctness, from a moral point of view, of the decision of the court, under the facts of this particular case, yet, in the light of other decisions in this country, it would seem that it would have been sufficient to have based the decision upon the intention of the parties, regardless of whether or not the credit given were actually drawn upon.

Morse, in his work on Banks and Banking, p. 424, approves the doctrine laid down in Clark *v.* Merchants' Bank, 2 N. Y. 380, and Scott *v.* Ocean Bank, 22 N. Y. 289, to the effect that "if a bill or draft be forwarded by its owner for collection, and by order or custom of dealing the party receiving it places the amount to the credit of the owner, and the owner thereupon draws or is entitled to draw against the same as cash, this works a transfer of title, so that the owner can not follow the paper or its proceeds in the hands of a third party receiving it in good faith and the due course of business from the agent for collection."

It has been expressly held by the Missouri Supreme Court that if a paper be deposited in or forwarded to a bank for col-

lection, and in pursuance of a pre-arranged mode of dealing, the bank immediately places the amount to the credit of the depositor and the depositor thereupon draws, or is entitled to draw against the same as cash, this works a transfer of title, so that the depositor can not afterward claim the paper; and it is immaterial that if the paper is not paid the bank has the right to charge it back. Such transaction is in effect the purchase of the paper by the bank, and the fact that on default of payment by the drawee the bank has recourse upon the indorser does not prevent title from passing. "Such is the right of every indorsee for value, but he is none the less the owner of the paper." Ayres *v.* Farmers' & Merchants' Nat. Bank, 79 Mo. 421, followed in Bullene *v.* Coates, 79 Mo. 426.

In the case of First Nat. Bank *v.* Armstrong, 39 Fed. 231, it appeared that by agreement and custom the F. bank received drafts from its correspondent bank at E., and credited them to it as cash, with the understanding that any draft which was unpaid should be charged back to the correspondent. The latter forwarded drafts which were credited to it, but were not collected before the F. bank failed. The drafts were paid after the appointment of a receiver, and the moneys actually came into his hands. The drafts were indorsed payable to the F. bank "for collection for the" bank at E. It was held that, as the drafts were, when received, credited as cash to the bank at E., which had the right at once to draw against them, the indorsement for collection did not affect the result, and the bank had only the rights of a general creditor.